IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

REVIEW PETITION NO.24 OF 2006

IN

ARBITRATION PETITION NO.351 OF 2005

M/s.Thanikkudam Bhagwati Mills Ltd. ... Petitioner

vs.

1.Mrs.Reena Ravindra Khona & others. ... Respondents

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Ms.Akhila Kaushik with S.Garud i/b. M/s.Khaitan & Jayakar, for Petitioner.

Mr.P.K.Samdhani with S.S.Purohit i/b. Purohit & Co. for Respondents.

**CORAM: D.K.DESHMUKH,J.**

**DATED: 9th October,2006**

**P.C.**:-

1. By this petition, the petitioner prays for review of the order dated 18.4.2006 passed by this Court. By that order, the petition filed by the petitioner under Section 34 of the Arbitration and Conciliation Act,1996 has been dismissed. The learned Counsel appearing for

petitioner submits that review application has been taken out pursuant to the liberty granted by the Division Bench of this Court by order dated 22.9.2006 passed in Appeal no.690 of 2006. That order reads as under:-

> " After arguing the Appeal for some time, the counsel for the Appellants prays for withdrawal of the Appeal with liberty to the Appellants to file review Application before the learned Single Judge, seeking review of the order dated 18th April,2006.
>
> Appeal is allowed to be withdrawn with liberty as prayed."

The learned Counsel submits that this review application is maintainable because of the order of the Division Bench granting liberty to the petitioner to file review petition. In my opinion, the submission is not well founded because the Division bench has not recorded finding that review application against the order passed under Section 34 of the Arbitration Act is maintainable. What the Division Bench has done is that it has granted liberty to the petitioner to file review application, obviously if review application is maintainable under the law. An objection is raised to the maintainability of this review application by the learned Counsel appearing for respondents relying on two judgments of the Supreme

Court viz. one in the case “Patel Narshi Thakershi and others. Vs. Pradyumansinghji Arjunsinghi, AIR 1970 Supreme Court 1273” whereinthe Supreme Court has held that there is no inherent power of review vested in any Court and unless the Statute confers specifically power of review, the Court or the quasi judicial authority does not get power of review. The learned Counsel also relies on the judgment of the Supreme Court in the case “Kapra Mazdoor Ekta Union Vs. Management of M/s.Birla Cotton Spinning and Weaving Mills Ltd. and others, AIR 2005 Supreme Court 1782.

2. The learned Counsel appearing for petitioner on the other hand relies on the judgment of the Supreme Court in the case “ITI Ltd. Vs. Siemens Public Communications Network Ltd., (2002)5 Supreme Court Cases 510” to contend that as the Supreme Court has held that High Court can exercise revisional jurisdiction under Section 115 of C.P.C. against an order passed in appeal under Section 37 of the Arbitration Act, this Court will have also power to review its own order because of the provisions of Section 114 of C.P.C.

3. One more objection is raised on behalf of the respondents to the tenability of this petition. The objection is that even assuming that the review application under Section 114 of C.P.C. is maintainable, the limitation is provided by Article 124 of the Schedule of the

Limitation Act and it is of thirty days from the date of decree or order. The order of which review is sought is dated 18.4.2006. The present petition has been filed on 6.10.2006. Neither in the petition there are any grounds raised indicating as to how the application is filed within the time of limitation nor there are averments made claiming exclusion of any time spent in prosecuting the other proceedings as also application under Section 5 of the Limitation Act for condonation of delay has not been filed. The learned Counsel appearing for petitioner except saying that an application for condonation of delay could have been made by the petitioner, is not in a position to say anything. Even though the petitioner has stated that the petitioner had prosecuted the appeal bonafide and therefore, the petitioner is entitled to benefit of exclusion of time. However, there are no averments made in the petition claiming exclusion of time so that respondents could get an opportunity to reply the same.

4. Now if in the light of these rival submissions record is perused, it becomes clear that according to the petitioner, the present petition has been filed under Section 114 of the Civil Procedure Code. The order of which the review is sought is dated 18.4.2006 and has been passed by the Court under Section 34 of the Arbitration and Conciliation Act. It it nobody's case that there is any provision in the Arbitration Act conferring power on the Court to review its order.

Perusal of the judgment of the Supreme Court in the case of "Patel Narshi Thakershi" as also in the case of "Kapra Mazdoor Ekta Union" shows that there is no inherent power of review vested in any court. The power of review is creation of statute and therefore, unless the statute which creates power in the Court confers on the Court power to review its order, the Court does not get power of review. It is admitted position before me that the Arbitration Act as such does not confer power on the Court to review the order made by it under Section 34 of the Arbitration Act.

5. So far as reliance place by the learned Counsel appearing for petitioner on the judgment of the Supreme Court in the case "ITI Ltd." is concerned, perusal of that judgment shows that the question that was considered by the Supreme Court in that case was whether revision under the provisions of Section 115 of CPC is maintainable against an order passed in appeal. The appeal is provided by the Arbitration Act under Section 37 of that Act. Section 37 of the Arbitration Act reads as under:-

> "37. Appealable orders – (1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely:-

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16;

or

(b) granting or refusing to grant any interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

Perusal of section 37 of the Act shows that section itself does not name or designate appeal court or forum. It says an appeal shall lie from the orders which are mentioned in that section to the Court which hears appeals from the original decrees passed by the Court which has passed the order. This obviously refers to hierarchy of the Courts under Civil Procedure Code and therefore, the Supreme Court by its judgment in "ITI Ltd" has held that the revision application against the order passed by the appeal court under Section 37 of the Act is maintainable and it is only for that reason that the Supreme Court has held that bar under Section 5 of the Arbitration Act would not be

attracted. In my opinion, Section 5 of the Arbitration Act clearly excludes any power to the Court which is not specifically conferred on the Court by the Act. Section 5 of the Arbitration Act reads as under:-

> "5. Extent of judicial intervention- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

Section 5 of the Act clearly indicates that judicial authority or court shall exercise only such powers in relation to arbitration as is conferred on it by the Act. Therefore, unless power of review is specifically conferred on the Court by the Act, it will not have power to review its order. In paragraph 13 of the judgment in the case "ITI Ltd." the Supreme Court has held that the provisions under Section 5 of the Arbitration Act cannot be read to deny power of revision to the High Court against the order passed in appeal under Section 37 of the Act. Paragraph 13 reads as under:-

> "We also do not find much force in the argument of learned counsel for the appellant based on Section 5 of the Act. It is to be noted that it is under this Part, namely, Part I of the Act that Section 37(1) of the Act is found, which provides for an appeal to a civil court. The term "court" referred to in the said

> provision is defined under Section 2(e) of the Act. From the said definition, it is clear that the appeal is not to any designated person but to a civil court. In such a situation, the proceedings before such court will have to be controlled by the provisions of the Code, therefore, the remedy by way of revision under Section 115 of the Code will not amount to a judicial intervention not provided for by Part I of the Act. To put it in other words, when the Act under Section 37 provided for an appeal to the civil Court and the application of the Code not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar under Section 5 will not be attracted because conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the Code also."

Reading of the above paragraph no.13 makes it absolutely clear that the judgment of the Supreme Court is turns on the construction of provision of sub-section (1) of Section 37 of the Act.

6. Taking overall view of the matter therefore, in my opinion, as there is no provisions in the Act specifically conferring power of review on the Court under Section 34 of the Act, there is no power vested in the Court to review its order.

7. So far as the question of limitation is concerned, according to the learned Counsel appearing for petitioner, the petition has been filed for review under Section 114 of Civil Procedure Code. Article 124 of the Schedule of the Limitation Act lays down period of limitation which reads as under:-

| Description of application | Period of limitation | Time from which period begins to run. |
|---|---|---|
| "124. For a review of judgment by a court other than the Supreme Court." | Thirty days | The date of the decree or order |

It is clear that time for filing review against any judgment starts running from the date of decree or order. In the present case, the order of which the review is sought is dated 18.4.2006 and the review petition is filed on 6.10.2006. Perusal of the petition shows that except paragraph 14 there is no other paragraph in the petition which can have even remote connection to the question of limitation. Paragraph 14 reads as under:-

> "The petitioners had also preferred an appeal being appeal no.690 of 2006 before this Hon'ble Court. The same was withdrawn by an Order dated 22nd September,2006 with the liberty to file a review petition. Hereto annexed and marked as Exhibit B is a copy of the Order dated 22nd September,2006 passed by this Hon'ble High Court."

Even if it is assumed that by this paragraph the petitioner is seeking exclusion of time spent by it in prosecuting the appeal before the Division bench then it is necessary for the petitioner to disclose on what date the appeal was filed and on what date it is disposed of and how the petitioner is claiming exclusion of time. For claiming exclusion of time spent in prosecuting the appeal, it will have to be pleaded that the appeal was filed and prosecuted bonafide and in good faith. No such pleading is to be found. It is no doubt true that it was also open to the petitioner to apply for condonation of delay but the petitioner has chosen not to do so. It is thus clear from the material available on record that the petition is also barred by law of limitation even assuming that the review under section 114 of C.P.C. is maintainable.

8. The learned Counsel appearing for petitioner also relies on the provisions of Section 42 of the Arbitration and Conciliation Act, to contend that the review petition against the order passed under Section 34 of the Act is maintainable. Section 42 of the Act reads as under:-

> "42. Jurisdiction - Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an

> arbitration agreement any application under this part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court. “

Perusal of Section 42 of the Act shows that only purpose for which the legislature has enacted this provision is that in a case where several courts are competent to deal with the matter and if one of the parties approaches one of those Courts then by operation of Section 42 of the Arbitration Act jurisdiction of all the other courts which may otherwise be competent to entertain the dispute on the subject matter stands ousted. Section 42 of the Act is not even remotely connected with the question of power of the Court to review the order made under Section 34 of the Act without there being any power vested under the Act. For all these reasons the petition is dismissed. The petitioner is directed to pay cost of this petition to the respondents as incurred by the respondents.

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